

Court of Appeals.—1820.

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IN A CASE BETWEEN,

PIERRE GOUIN, et al;
(Plaintiffs in the Court below,)

APPELLANTS;

AND

PIERRE ROUSSEAU et al;
(Defendants in the Court below,)

RESPONDENTS.

*Paid 17 Nov 1820
J. H. W.*

C. R. OGDEN, Attorney.

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PIERRE GOUIN, et ux :
(Plaintiffs in the Court below)

AND
APPELLANTS ;

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(Defendants in the Court below)

RESPONDENTS.

This was an action brought in the Court of King's Bench for the District of Three-Rivers, in the Term of September last, grounded on, and arising out of certain clauses, stipulations and reserves contained in a Donation *entre vifs*, by the Appellants to Respondents, and executed on 25th October, 1819, before Ranvoyzé, Notary, and Witnesses, by which the Appellants gave to the Respondents—

First.—A lot of land of three acres in front by twenty-two in depth, situated in the Town of Three-Rivers, with a Barn thereon erected.

2ndly.—Another lot of seventy feet in front, by upwards of three hundred in depth, with a house thereon.

3dly.—Another lot of land of an acre in front.

4thly.—A building lot situated in the Town of Three-Rivers, of one hundred and thirty feet in front by ninety feet in depth, with an Oil Mill and House thereon.

5thly.—A lot of land situated in the Town of Three-Rivers, of thirty-six feet in front, by one hundred and eighty-six feet in depth.

6thly.—A lot of land in the Common of the said Town of Three-Rivers, containing two hundred and thirty feet in front by one hundred and twenty feet in depth, with two Houses, a Stable, a Store, and other dependencies built thereon.

7thly.—A lot of land situated in St. Philip street, of the said Town, of two hundred and six feet in front and one hundred and fifty-seven in depth, together with all the farming utensils and all the moveables, *meuble meublans*, of which they were possessed or might be possessed of at the time of their decease, except the reserves in the said Donation mentioned, to wit, all the moveables and household furniture, which they the Appellants might desire to take from among those which should be then found in the House for their use, and also on condition of maintaining the Appellants and furnishing them with all the necessaries of life, and that so long as they might agree together and a good understanding exist, but in the event of the contrary (*en cas d'incompatibilité d'humeur*) then the Appellants and Respondents should each name an Expert for the purpose of fixing and establishing *une rente ou pension viagère* for the said Appellants in conformity with the property so given by the Appellants, the said Appellants expressly reserving to themselves the right of taking all the Household furniture for their use, also, a horse, harness and such carriages as they might think fit to take, also, the enjoyment of a lot of land and house, situated in Three-Rivers, then in the occupation of one James Burns, bounded on one side by the property of one François Rousseau, and on the other by the house and premises of the Appellants, and in which they resided at the time of making the said Donation.

As early as the month of March following, some disagreement and misunderstanding having taken place, evincing too strongly the *incompatibilité d'humeur*, the Appellants left Three-Rivers and went to reside at Montreal, whereupon they required the Respondents in compliance with the provision made in the donation, to name an expert, and on the 10th of August, the Appellants by Geneviève Rousseau the wife of Pierre Gouin, his special Attorney for that purpose (see Exhibit, No. 2) and Respondents went before Badeaux, N. P. & witnesses, and there entered into an agreement of which the following extract is only material, "que le 25 Octobre de l'année dernière les dits Sieur et Dame Gouin, (the Appellants) auroient fait donation de certains biens et immeubles à la charge, entre autres que dans le cas d'incompatibilité d'humeur entre les Donateurs et Donataires, qu'ils nommeroient ensemble chacun un Expert pour fixer et établir une rente ou pension viagère au dits Sieur et Dame donateurs, conformément aux biens par eux donnés par le dit acte, en conséquence de laquelle clause, les dites parties sont convenus de nommer les personnes de René Kimbert et Etienne LeBlanc, Ecuiers, comme Experts pour fixer et établir une rente ou pension viagère et alimentaire, que le dit Pierre Rousseau, pourroit être tenu de payer aux dits Sieur et Dame Gouin, eu égard à la valeur des biens immeubles, donnés par la Donation, et dans le cas que les dits René Kimbert et Etienne

" Etienne LeBlanc ne se trouveroient d'accord, sur le quantum de la dite rente au pension, viager et alimentaire; ils auroient le droit de nommer un tiers Expert pour agir conjointement avec eux et sans rien préjudicier aux autres charges, obligations et réserves y mentionnées au dit acte de Donation."

This nomination of Messrs. Kimbert & Leblanc having been accepted of by them, they proceeded to fix and establish the pension as agreed upon by the Appellants and Respondents, and on the 28th of the same month (August) they came to a decision of which they drew up a *Procès verbal* and deposited the same in the Office of J. E. Dumoulin, Esq. N. P. *dont acte*, which *procès verbal*, together with the act of deposit in the office of Mr. Dumoulin, were by him on the following day duly signified to Pierre Rousseau, the Respondent, and a true copy left with him; subsequent to this signification to the Respondents, the parties met for the purpose of passing an act *d'acquiescement*, and sent for the Experts to fix the time the pension was to commence.

An Act *d'acquiescement* was immediately drawn up, and it was then that the Respondents refused to ratify it; alleging, as a reason, "*that it should not mention that the pension had been fixed on the immovable property only*," evidently shewing a disposition to withhold from their benefactors the household furniture and moveables which they had expressly reserved to themselves, endeavouring thereby to change the express terms specified in the agreement of the 10th August, 1820, to induce a belief that the pension was to have been fixed on all the property given, as well moveable as immovable, and (this after they had received from the Appellants Property to the amount of £2500, Currency).

The Appellants and Respondents then separated, and on the 31st August, the Appellants, by the ministry of Dumoulin, N. P. demanded of the Respondents the household furniture, and the horse and carriages; to this demand the Respondents answer they are willing to do so, provided the furniture be not carried out of town, and that the horse remain in their stable; which answer not being deemed satisfactory, a Protest is duly made, and on the following day, notwithstanding the Respondents' answer, they commence the delivery of the household furniture to the Appellants, alleging that motives of gratitude alone induce them to do so; but, strange to remark, on the following day they withhold the remainder. From such conduct on the part of the Respondents, the Appellants clearly saw that any further attempt to an amicable arrangement would be futile, they were, in consequence, driven to institute an action as aforesaid; and in their declaration they set forth the Donation—the subsequent argument between the parties—the *Procès Verbal* of the Experts—the misunderstandings which followed—and conclude: 1st. That the *Procès Verbal* be homologated, and that the Respondents be condemned to pay to the Appellants, *leur vie durant*, the sum of £112 10s, current money of this Province, per Annum, in quarterly payments of £28 2s 6d each, and to commence from March last (1820) and in advance—2dly. to deliver to the Respondents, à dire d'Experts, a good horse, and harness complete, and a good calash and cariole, for their use, &c. &c. 3dly. To deliver to the Respondents the household furniture reserved to them by the Donation, and subsequently agreed to by the Respondents, without prejudice to other reserves therein-mentioned.

In support of this action the Appellants filed 7 exhibits, viz :

1. The Donation,
2. A letter of Attorney from Pierre Gouin to Geneviève Rousseau, his wife,
3. The convention between the parties,
4. *Procès Verbal* of Experts,
5. Protest by Appellants against Respondents,
6. List or inventory of effects delivered by Respondents,
7. Protest by Respondents against Appellants.

To this action the Respondents (in Court below) filed a certain *exception peremptoire pépétuelle en droit*, by which they state that by the donation on which the action is founded, they the Respondents are not bound to deliver the moveables reserved *hors de la maison donnée*, but in the room reserved as the future residence of the Appellants, nor, are they the Respondents bound to furnish a horse and carriages except on the property given.—That previous to the institution of the action, they tendered one quarter of the pension fixed by the experts as commencing from the 25th June then last, and further that before the bringing of the action that they delivered part of the moveables, and that they are now ready to furnish the Appellants with the remainder, but not the horse and carriages which they the Respondents allege would be in direct contradiction with the terms of the donation, (and this is the only defence filed by the Respondents)

To

To this a general answer on the part of the Appellants was filed, and the parties proceeded to evidence.

The Appellants produced four witnesses, to wit, Mr. Joseph Dubord Lafontaine, Joseph Badaux, René Kimber, Etienne Leblanc, Esquires.

The 1st and 2d of whom prove the value of the moveables to be between £300 or £400, and also the delivery of the articles mentioned in Appellants' exhibit, No. 6, the other three, that the reason that the Respondents refused to sign the *acquiescement* was because, mention was made therein that the pension had been fixed on the immoveables only, alleging that it had been fixed on all that was given by the Donation—however, by the evidence of the *experts* Messrs. Kimber and Leblanc, it will be clearly seen, that it was fixed and established by them on the value of the *immoveables* only.

The Respondents having declared they had no witnesses, the *Enquête* was closed;—and on the 28th September, the cause was heard on the merits of the contest between the parties, and on the 30th following, the court pronounced the following extraordinary Judgment—“*La Cour après avoir entendu les parties par leur Avocat, examiné la procédure et témoignages et en avoir délibéré, renvoie les Demandeurs de leur action avec dépens, et la Cour déclare les offres faits par les Défendeurs valables, et ordonne que la somme déposée soit payée aux Demandeurs : Sauf aux dits Demandeurs leurs recours si aucun ils ont pour raison du cheval et des voitures mentionnés en la donation.*”

From this Judgment, so contrary to the express terms of the Donation, and so much in opposition with the offer of the Respondents to deliver the household furniture, (which the Appellants had evidently reserved to furnish the adjoining house, the use and occupation of which they had also reserved in case of need,) the Appellants found just grounds of appeal, and more particularly from that part of it, which reserves to them their recourse for the Horse and Carriages, upon which they contend the court below should have finally decided in their favor, and should have condemned the Respondents to pay the costs of the action in the court below.

Quebec, 17th November, 1820.

C. R. OGDEN,
Attorney for Appellants.

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